75-1148

IN THE

Supreme Court of the United States

October Term, 1975.

No. 1148.

IN THE MATTER

OF

The Petition of ROBERT M. LALLI,
Appellant,

To Compel ROSAMOND LALLI, as Administratrix of the Estate of MARIO LALLI, Deceased,
Appellee,

To render and settle her account as Administratrix.
ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

MOTION TO DISMISS.

LEONARD WEISS
Attorney for Appellee
20 East First Street
Mount Vernon, N. Y. 10550
(914) 668-5506

AVSTREIH, MARTINO & WEISS
Of Counsel

Table of Contents.

CITATIONS.

IN THE

Supreme Court of the United States

October Term, 1975.

No. 1148.

IN THE MATTER

of

The Petition of ROBERT M. LALLI,

Appellant,

to Compel

ROSAMOND LALLI, as Administratrix of the Estate of Mario Lalli, Deceased,

Appellee,

to render and settle her account as Administratrix.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

MOTION TO DISMISS APPEAL.

Pursuant to Rule 16, paragraph (1) (b), of the Rules of the Supreme Court of the United States, appellee moves this Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth.

Jurisdiction.

Appellant appeals from a final judgment rendered by the Court of Appeals of the State of New York, entered on November 25th, 1975, affirming the decree of the Surrogate's Court of Westchester County, dismissing the

petition for a compulsory accounting and adjudging that Estates, Powers & Trusts Law, Section 4-1.2 is constitutional. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (2).

Question Presented.

Are the succession provisions contained in the Estates, Powers & Trusts Law, Section 4-1.2, relating to the right of illegitimate children to share in intestate distributions, even to the exclusion of illegitimates, violations of the equal protection and due process clauses of Amendment XIV to the Constitution of the United States?

Statute Involved.

Estates, Powers and Trusts Law §4.1-2, 17B, McKinney's Consolidated Laws of New York, 531-532, provides as follows:

§4-1.2 *Inheritance by or from illegitimate persons*

(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from

the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

§83-a. *Inheritance by and from illegitimate persons*

1. For the purposes of this article:

a. An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

b. An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction shall have found the decedent to be the father of such child and shall have made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

c. The approval of any agreement or compromise without the making of an order of filiation declaring paternity shall not enable the child to inherit from the respondent in any such proceeding.

d. No order shall be sufficient to relieve the party alleged to be the father unless the motion to relieve from the effect thereof is made by the

party declared to be the father and is made not more than one year after the entry of such order.

2. If the deceased was illegitimate his surviving spouse, issue, maternal kindred and father shall inherit in the same manner as if the deceased were legitimate and shall be entitled to letters of administration in the same order, provided that his father shall take only if an order has been made in compliance with the provisions of subparagraph b hereof. Added L. 1965, c. 958, §1, eff. March 1, 1966.

Statement.

Decedent died intestate on January 7th, 1973. The natural mother of the appellant predeceased the decedent, having died on October 11th, 1968. The appellant alleges that he and his sister are children of the decedent; were born out of wedlock, and that filiation proceedings were neither instituted nor any order of filiation declaring paternity ever made at any time on behalf of either of them.

On August 26th, 1974, the appellant filed a petition seeking a compulsory accounting. On October 1st, 1974, appellee served a notice of motion to dismiss on the ground that the appellant was not a distributee. Appellee's motion to dismiss was granted by the Surrogate by the decree entered on November 26th, 1974 (Appendix C), and the Court of Appeals unanimously affirmed by the final judgment entered on November 25th, 1975 (Appendix D).

Argument.

We believe that there is no substantial doubt as to the constitutional validity of Estates, Powers & Trusts Law,

Section 4-1.2, and that the constitutional issues in this case do not require plenary consideration by this Court. We believe that the judgment rests on an adequate non-federal basis and does not present a substantial federal question. Hence we submit that this Court should dismiss the present appeal.

Under Section 83 of the former Decedent Estate Law of the State of New York, an illegitimate child could not inherit from his father. *Rivera v. Celeberezze,* D. C. Puerto Rico, 1966, 248 F. Supp. 807.

Subdivision 14 of Section 83, dealing with the inheritance rights of the illegitimate, restricted such rights to inheritance from the estate of the mother under certain circumstances, and the illegitimate was not entitled, under the statute or otherwise, to inherit from the putative father. *Saks v. Saks,* 1947, 189 Misc. 667, 71 N. Y. Supp. 2d 797.

In a broad reversal of policy, the 1965 Enactment of Section 83-a of the Decedent Estate Law, as added by L. 1967, ch. 958, Section 1, eff. March 1, 1966, repeated the restrictive subdivisions of Section 83, and established a two-year time limit to seek an order of filiation so that an illegitimate child could inherit from his father.

The pertinent provisions of Section 83-a were shortly thereafter applied and upheld in the *Matter of Eloise E. Johnson, Petitioner, v. Ward Berger, Respondent,* in the Family Court, New York County, by a decision reported on August 3rd, 1966, 51 Misc. 2d 513, 273 N. Y. Supp. 2d 484, affirmed without opinion 276 N. Y. Supp. 2d 990. In the *Johnson* case it was held that, if a court of competent jurisdiction makes an order of filiation in a paternity proceeding timely commenced, an illegitimate child has the right of inheritance from its father. It

was noted that a right of inheritance from his father by an illegitimate child was not recognized as common law but could be bestowed if a court of competent jurisdiction shall have made an order of filiation in a paternity proceeding timely commenced as provided by statute.

In the case of *In the Matter of ABC, Petitioner, v. XYZ, Respondent,* 50 Misc. 2d 792, 271 N. Y. Supp. 2d 781, decided by the Family Court, New York County, on July 17th, 1966, it was held that even where there was a court approved agreement in which the alleged father denies paternity but agreed to pay support monthly, and such putative father's payments and performance do not bar subsequent proceeding to obtain adjudication of paternity only, it is, nevertheless, necessary that the proceeding by the mother to establish paternity must be instituted within two years after the birth of the child.

In the case of *In the Matter of the Estate of John Consolazio, Deceased,* decided in the Surrogate's Court, Richmond County, on May 31st, 1967, 54 Misc. 2d 398, 282 N. Y. Supp. 2d 905, the Court said:

> "• • • Open acknowledgment by the father is not the equivalent of a court finding of paternity; nor is a legislative desire to avoid post-death litigation on the issue of paternity unreasonable (see Report No. 1.8A, Fourth Report, Temporary State Commission on the Law of Estates)."

> "A child born, through no fault of his own, out of wedlock commands sympathy. When he is acknowledged and supported by his father, the financial loss resulting from his father's death is not altered by the fact of his illegitimacy. But it cannot be said that the Legislature acted in an arbitrary manner when it excluded illegitimates whose paternity was not established in a court proceeding. Classification must be done fairly (*Gulf,*

> *Colorado & Santa Fe Ry. v. Ellis,* 165 U. S. 150; *United States v. Perkins,* 163 U. S. 625), but a classification based upon a recognition of the problems of post-mortem proof of paternity is not unfair."

These rules have been imported without substantive change into EPTL Section 4-1.2, L. 1966, c. 952; amended L. 1967, c. 686, Sections 28, 29, effective September 1, 1967.

The provisions of Section 4-1.2 of the *then* newly created Estates, Powers and Trust Law, was considered in the case of *In the Matter of Ruth Middlebrooks, Petitioner, v. David W. Hatcher, as Administrator of the Estate of David Hatcher, Deceased, Respondent,* decided by the Family Court, Suffolk County, October 18th, 1967, 55 Misc. 2d 301, 285 N. Y. Supp. 2d 257, wherein the Court found an intent on the part of the Legislature to avoid post-death litigation in this area.

Bearing in mind that the thrust of the appellant's position is addressed to the equal protection clauses of the United States Constitution and the Constitution of the State of New York, it is to be noted that this precise issue was carefully considered in a learned decision rendered by Mr. Jusice Nathan R. Sobel, Surrogate of Kings County, on August 15th, 1969, in the case of *In the Matter of the Estate of Julio S. Ortiz, Deceased,* 60 Misc. 2d 756, 303 N. Y. Supp. 2d 806. Perceiving a rational legislative purpose in discriminating between a child-father relationship which is not present in the child-mother relationship, the Court stated:

> "It is not difficult to perceive a rational purpose in excluding illegitimates in a statute governing intestate inheritance from the father. In such a statute the illegitimates' rights often come into

direct conflict with those of a spouse and legitimate children. Recognition of the illegitimate automatically diminishes the share of such other next of kin" (p. 761).

The *Ortiz* case was followed by *Matter of Hendrix*, 68 Misc. 2d 439, 326 N. Y. Supp. 2d 646 (1971), as well as *Matter of Bolton*, 70 Misc. 2d 814 (1972).

In the *Hendrix* case, *supra*, the Court said:

> "The court concludes that the New York Statute requiring a reasonable substantiation of the claim of paternity does not impose an improper condition and does not result in a discrimination constituting a denial of equal protection of the law to an illegitimate. It is held that the infant has not established that she is a distributee of decedent and, as a consequence, she lacks status to oppose the petition."

In the *Bolton* case, *supra*, the Court said:

> "The Legislature was attempting to provide fair and reasonable standards for proving rights to participate in an estate. There are obvious reasons for different provisions in respect of the mother's estate and that of the putative father. The Legislature found good reason for requiring a court determination of paternity and for prescribing a limitation of time."

Thus, in reviewing the language of EPTL Section 4-1.2, the sole problem is to determine whether there is a reasonable basis for the statute or, to the contrary, whether its provisions constitute an arbitrary discrimination against those illegitimates who claim a paternal relationship.

In *Labine v. Vincent*, 1971, 91 S. Ct. 1017, 401 U. S. 532, 28 L. Ed. 2d 288, this Court upheld the constitutionality of a Louisiana statute which contained succession provisions relating to the right of illegitimate children to share in intestate distributions. In specifically denying illegitimates the right to take under state laws of succession, the Court distinguished a claim to share in an estate by reason of intestacy from claims to share in the proceeds from wrongful death actions as in *Levy v. Louisiana*, 391 U. S. 68, and *Glana v. American Guar. Co.*, 391 U. S. 73.

> "The Legislature was attempting to provide fair and reasonable standards for proving rights to participate in an estate. There are obvious reasons for different provisions in respect of the mother's estate and that of the putative father. The Legislature found good reason for requiring a court determination of paternity and for prescribing a limitation of time."

Surely the New York statute is as fair and reasonable as Louisiana's.

The constitutionality of the restrictions in EPTL 4-1.2, which permit illegitimate children to inherit from the father only in those cases where the Court has, during the lifetime of the father, made an order of filiation declaring paternity in proceedings instituted during the pregnancy of the mother or within two years from the birth of the child, has repeatedly been considered and upheld by the Courts of New York and the issue of the constitutionality of such inheritance statutes has already been passed upon by this Court. Thus appellee submits that the judgment of the New York Court of Appeals in this case rests on an adequate non-federal basis and does not present a substantial federal question.

CONCLUSION.

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

LEONARD WEISS,
Attorney for Appellee,
20 East First Street,
Mount Vernon, N. Y. 10550
(914) 668-5506.

AVSTREIH, MARTINO
& WEISS,
Of Counsel.

APPENDIX A.

Opinion of Surrogate's Court Westchester County

SURROGATE'S COURT

WESTCHESTER COUNTY

In the Matter of the Petition of

ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the Estate of

MARIO LALLI,

Deceased,

to render and settle her accounts as such Administratrix.

HENKIN, HENKIN & QUINN,
Attorneys for Petitioner

MURIEL LAWRENCE,
Attorney for Respondent

BREWSTER—S.

This is a motion to dismiss a petition for a compulsory accounting on the ground that the petitioner, an illegitimate person, has no status as a distributee to compel an accounting. Petitioner attacks the constitutionality of the statute on descent and distribution of a decedent's intestate property as it applies to illegitimate issue on the grounds that it is a denial of equal protection under the Constitution of the United States (Fourteenth Amendment) and the Constitution of the State of New York (Article I, §11).

Decedent died on January 7, 1973. The mother of petitioner predeceased the decedent. The constitutional issue was initially raised on the application by an alleged son for letters of administration. However, no determination was made at that time since the widow who had a prior right to letters, duly qualified and was appointed administratrix on December 26, 1973.

The petitioner in this compulsory accounting proceeding states that he and his sister are children of decedent; were born out of wedlock; and that filiation proceedings were neither instituted nor any order of filiation declaring paternity ever made at any time on behalf of either of them. They do state, however, that they were supported, in part, by the decedent during his lifetime. Petitioner and his sister claim to be lawful distributees of the decedent together with decedent's widow. They further claim that EPTL §4-1.2(2) which would deny them a share in the estate of decedent as distributees by reason of their illegitimacy without an order of filiation having been made during the life of the father declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child, is unconstitutional and therefore void. The motion by the administratrix to dismiss the petition relies on the constitutionality of the aforesaid statute, asserting that even if the proof is offered which establishes that decedent was the father of petitioner and his sister or contributed to their support, nevertheless they are not distributees by virtue of the statute and petitioner has no status to compel an accounting by the administratrix.

This is not a novel issue. The exclusion of illegitimates, as distributees under various state statutes has already

been considered by the courts. In recent years the United States Supreme Court has on three separate occasions considered the constitutionality of the complex set of rules regarding the rights of illegitimate children in the statutes of the State of Louisiana. In the case of Levy v. Louisiana, 391 U. S. 68, the denial of the right of an illegitimate child to recover damages for the wrongful death of his mother was declared unconstitutional. In a second case, Glona v. American Guarantee, 391 U. S. 73, the Louisiana statute that denied the right of a mother to recover damages for the wrongful death of her illegitimate child was also declared unconstitutional. Next was decided the case of Labine v. Vincent, 401 U. S. 532, in which the right of the State of Louisiana to make laws for distribution of property, even to the exclusion of illegitimates, was upheld as constitutional. After considering the restrictive provisions under Louisiana law with respect to illegitimates, the Court held:

> "These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collat-

eral relations, as opposed to ascendants, and against ascendants, as opposed to descendants.

• • • • •

"It may be possible that some of these choices [of distribution of an intestate's property] are more 'rational' than the choices inherent in Louisiana's categories of illegitimates. But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. • • • We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State." Labine v. Vincent, supra, pp. 537-539.

The New York law on inheritance by or from illegitimate persons is set forth in EPTL §4-1.2 which provides in part as follows:

"(a) For the purposes of this article:

"(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

"(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation

declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

"(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

"(4) • • • • • •"

This statute has been somewhat eroded by constitutional attacks made upon some of its provisions as applicable to certain types of cases. In so far as the statute would limit and restrict the rights of illegitimate children who have suffered pecuniary injuries to share in the distribution of damages recovered in an action for the wrongful death of their putative father, it has been declared unconstitutional (Matter of Ortiz, 60 Misc 2d 756). But even in the Ortiz case it was pointed out that the Legislature may in its absolute discretion designate one class of beneficiaries to inherit and another class to receive the damages for wrongful death. Referring to the equal protection clauses of the U. S. Constitution (Fourteenth Amendment) and the Constitution of the State of New York (Article I §11) the court said:

"These provisions do not forbid unequal laws and do not require every law to be equally applicable to all persons (Barbier v. Connolly, 113 U. S. 27). Equal protection only requires that a statute operate equally upon all members of the group provided the group is defined reasonably—reasonably being measured in terms of a proper legislative purpose." p 759.

Perceiving a rational legislative purpose in discriminating between a child-father relationship which is not present in the child-mother relationship, the court further stated:

"But some difference does exist in such relationships at least with respect to the greater difficulty in ascertaining paternity. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy. To the mother however, the birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is a child of a particular woman is rarely difficult to prove. Proof of paternity on the other hand as experience has shown is a much more difficult problem.

• • • • •

"It is not difficult to perceive a rational purpose in excluding illegitimates in a statute governing intestate *inheritance* from the father. In such a statute the illegitimates' rights often come into direct conflict with those of a spouse and legitimate children. Recognition of the illegitimate automatically diminishes the share of such other next of kin." Matter of Ortiz, supra, p. 761.

The constitutionality of the restrictions limiting illegitimates to inherit from their father in certain cases only was considered in Matter of Crawford, 64 Misc 2d 758. The court stated at page 763:

". . . It is urged that this limitation creates an arbitrary classification as to infants, where there is no filiation order within two years from the date of birth. The test to be applied 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without much basis.' (Truax v. Corrigan, 257 U. S. 312, 337; Matter of Posner v. Rockefeller, 31 A D 2d 352.)

"The limitations upon the right of an illegitimate child to inherit from its father are set forth in absolute fashion in the statute. The two-year limitation provision is not akin to the Statute of Limitations found in section 517 of the Family Court Act but rather it establishes a 'rule of substantive law, a statute prerequisite • • • a condition precedent' to the qualification of the infant as a distributee under EPTL 4-1.2.

"The legislative intent is clear on this point: 'Since inheritance from the father of an illegitimate has always been intertwined with proof of paternity, it is recommended that only a limited right of inheritance from the father be permitted. The child is only permitted to inherit from the father where a court of competent jurisdiction (which under present law in most cases will be the Family Court) has made an order declaring paternity during the lifetime of the father in a proceeding commenced within two years after the birth of the child.' (Fourth Report of Temporary State Comm. on Law of Estates, 1965, p. 37; N. Y. Legis. Doc., 1965, No. 19.)

"Such limitations are not arbitrary or capricious, but were adopted by the Legislature to avoid post-

death litigation. (Matter of Consolazo, 54 Misc 2d 398; Matter of ABC v. XYZ, 50 Misc 2d 792; Matter of Middlebrooks v. Hatcher, 55 Misc 2d 257.)"

Matter of Hendrix, 68 Misc 2d 439 considered anew the constitutionality of EPTL §4-1.2 and after a full discussion of the many cases involving the same concluded "that the New York statute requiring a reasonable substantiation of the claim of paternity does not impose an improper condition and does not result in a discrimination constituting a denial of equal protection of the law to an illegitimate". p. 444. In Matter of Bolton, 70 Misc [2] 814, the court reconsidered the statute anew, reaffirmed its constitutionality and despite the fact that decedent had admitted paternity in an affidavit, it held that only full compliance with the provisions of EPTL §4-1.2 could entitle an illegitimate child to inherit from the putative father. The court stated: "It is for the Legislature and not the court to overcome the restrictive elements of this statute." p. 819.

Cases involving wrongful death cited by the petitioner in which limiting provisions of the statute were voided as unconstitutional are not determinative of the issue here. As pointed out by the court in Labine v. Vincent, supra, p. 536:

> "The cause of action alleged in Levy was in tort. The court held that the state could not totally exclude the illegitimate children who were unquestionably injured by the tort. Levy did not say that a state can never treat an illegitimate child differently from legitimate offspring."

The Supreme Court of New Jersey clearly pointed out the distinguishing elements in the claims of illegitimates to damages for wrongful death of a putative father as opposed to inheritance from a decedent. In Schmoll v. Creecy, 54 N. J. 194, the court stated:

> "... There are of course differences between a wrongful death statute and an inheritance statute. A wrongful death statute itself determines who shall benefit, and the decedent has no voice in the matter. On the other hand, an inheritance statute embodies no more than the presumed intention of decedents who do not express their wish. It may therefore be urged that our inheritance statute does not generate a distinction between legitimate and illegitimate children but merely reflects the probable intent of individuals who are themselves constitutionally free to draw that line and who presumptively subscribe to the view of the statute by omitting to direct otherwise by will. Then, too, at least in the case of a male decedent, there is fear of spurious claimants, a problem more formidable in estate situations than in wrongful death actions in which the amount of the recovery will depend critically upon the amount of pecuniary injury shown."

Finally, the court observes that while the limitation in EPTL §4-1.2 on bringing an action to declare paternity within two years from the birth of the child has been declared unconstitutional as an irrational discrimination between two classes of individuals, namely public welfare officials and others (Wales v. Gallan, 61 Misc. 2d 831), nevertheless the requirement that it be done during the lifetime of the father, giving him a chance to contest the same, is

obviously a rational requirement and constitutionally sound. The attempt to prove paternity at this date comes too late.

Accordingly, the court determines that EPTL §4-1.2 is applicable to the alleged son of decedent, that he is not a distributee of the decedent herein and that he lacks status to petition for a compulsory accounting by the administratrix. The motion to dismiss is granted.

Settle order.

November 15, 1974

EVANS V. BREWSTER
Surrogate

APPENDIX B.

Opinion of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

Surr. Ct. No. 440

In the Matter of the Accounting of ROSAMOND LALLI as the Administratrix of the Estate of Mario Lalli, deceased,

ROBERT M. LALLI,

Appellant,

—v.—

ROSAMOND LALLI, as Administratrix &c.,

Respondent.

---

(440)

HENKIN AND HENKIN
Mt. Vernon
(LEONARD M. HENKIN of counsel)
for appellant.

AVSTREIH, MARTINO & WEISS
Mt. Vernon
(LEONARD A. WEISS of counsel)
for respondent.

JONES, J.

We hold that Section 4-1.2(a)(2) of the Estates, Powers and Trusts Law is not unconstitutional to the extent that it prescribes the entry during the father's lifetime of an order of filiation declaring paternity as a condition precedent for inheritance by an illegitimate child from his or her father.

In this case an illegitimate son, over 25 years of age at the time of his father's death, sought an order in Surrogate's Court for a compulsory accounting by the administratrix of his deceased father's estate. The administratrix, the decedent's widow, moved to dismiss the son's application on the ground that he was not a distributee and hence had no standing to compel an accounting.

The facts are undisputed. Appellant and his sister were the natural son and daughter of the decedent, having been born on August 24, 1948 and March 19, 1950, respectively. Respondent administratrix had been married to the decedent for some 34 years prior to the decedent's death on January 7, 1973, during which time the decedent and she had resided together as husband and wife. The natural mother of appellant and his sister had died on October 11, 1968. It was not contested that during his lifetime the decedent had provided financial support for both appellant and

his sister. Additionally it appeared that when appellant wished to be married in April, 1969 parental consent was required because he was then under age 21. Incident to the granting of such consent the decedent had acknowledged that appellant was his son in a writing sworn to before a notary public. It is agreed, however, that there was never any order of filiation.

The Surrogate granted respondent's motion to dismiss the application for a compulsory accounting on the ground that appellant was not a distributee under EPTL 4-1.2 (a)(2). In so doing the Surrogate rejected appellant's contention that § 4-1.2(a)(2) is unconstitutional. On direct appeal pursuant to CPLR 5601(b)(2) we affirm.

Section 4-1.2, bearing the heading, "Inheritance by or from illegitimate persons", provides in pertinent part:

> (a) For the purposes of this article:
>
> (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> (3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

• • •

Appellant's assault on § 4-1.2(a)(2) is grounded in contentions that its provisions deny him the equal protection of the law assured him under State and federal constitutions and the due process of law to which he is entitled under the federal constitution. In disposing of his challenge we address three aspects of asserted constitutional infirmity: first, the difference in proof of parenthood necessary to establish the right of inheritance from a natural father as contrasted with the proof required to establish the right of inheritance from a natural mother; second, the insistence that there be an order of filiation; and third, insistence that the order of filiation be made during the lifetime of the natural father.[1]

At the threshold we recognize a material distinction between benefits and rights to which an illegitimate child is entitled in consequence of the fact that he or she is the child of his or her parent on the one hand, and, on the other, expectations only to which such a child may look forward in consequence of a child-parent relationship. The former category includes entitlement to the proceeds of a wrong-

[1] Since this appellant's claim to status as a distributee is foreclosed by the provision of § 4-1.2(a)(2) that the order of filiation must be made during the lifetime of the natural father, a provision the constitutionality of which we here uphold, we do not reach the challenge addressed to the separate provision of the statute which requires that the paternity proceeding have been instituted "during the pregnancy of the mother or within two years from the birth of the child" (§ 4-1.2[a][2]). We intimate no views with reference to the asserted unconstitutionality of that provision.

ful death action (*Levy* v. *Louisiana*, 391 US 68; cf. *Glona* v. *American Guaranty Co.*, 391 US 73); to workmen's compensation benefits (*Weber* v. *Aetna Cas. & Surety Co.*, 406 US 164); to financial support from a father (*Gomez* v. *Perez*, 409 US 535); to social security benefits (*Jimenez* v. *Weinberger*, 417 US 628). In such cases the applicable standard for review as to constitutionality is that sometimes labeled strict scrutiny (a compelling state interest in the objective sought and the least restrictive means for achieving that objective [cf. *Montgomery* v. *Daniels*, —— NY2d ——, ——]).

As appellant concedes, however, the test in the present instance (involving only an inchoate expectancy at best) is whether there is a rational basis for the means chosen by the Legislature for the accomplishment of a permissible state objective. (*Labine* v. *Vincent*, 401 US 532; cf. *Montgomery* v. *Daniels*, *supra*, p. —). We have no difficulty in concluding under this less stringent test that there is a reasonable basis for each of the three distinctions which the Legislature has prescribed and which appellant attacks.

In the first place, given the state of our present knowledge in the field of genetics, it cannot be gainsaid that the identification of a natural mother is both easier and far more conclusive than the identification of a natural father. It may be one day that, notwithstanding the nonparticipating role of the father at birth, scientific tests will nonetheless be available by means of which the fact of fatherhood can be demonstrated as compellingly as is presently true with respect to the fact of motherhood. Clearly such proof is not available today. In this circumstance we conclude that the Legislature acted rationally in prescribing a specially defined procedure for establishing the fact of father-

hood. Once that fact is established in the formal manner required by the statute, the right of an illegitimate child to inherit from his father is the same as his right to inherit from his mother, and exactly the same as if he had been born in wedlock. There is no discrimination against illegitimacy. The difference exists only with respect to the means by which the fact of fatherhood is to be established, and then for sound and understandable reasons.

Secondly, we cannot say in the face of practical problems and difficulties associated with proof of fatherhood that it is irrational to require the formality of a court order adjudicating the fact of paternity. We recognize, of course, that in particular instances, a duly acknowledged written statement of paternity, or conclusive proof of substantial and continuous financial support may be very compelling. But even in such instances, under familiar principles an apparent admission of paternity may be negated by proof of misrepresentation, fraud, duress or other vitiating circumstance. To require the formality and conclusiveness of a judicial determination is not irrational.

Finally, we conclude that it was not irrational, either, to lay it down as a condition precedent that the order of filiation must be made during the lifetime of the natural father. The father may be expected to have greater personal knowledge than anyone else, save possibly the mother, of the fact or likelihood that he was indeed the natural father. His availability should be a substantial factor contributing to the reliability of the fact-finding process. Beyond that, and perhaps even more important, by their very nature the statutes of descent and distribution serve as an expression of the presumed intention of the deceased for the distribution of his property on his death, absent any

effective testamentary or *inter vivos* disposition. No one questions that a natural father may disinherit his son notwithstanding that the fact of fatherhood has been conclusively established in a paternity proceeding; he has only duly to execute a will appropriate for that purpose. Similarly a father may effectively provide for the distribution of all or any part of his property to an illegitimate child notwithstanding that there has been no order of filiation. Since, then, the ultimate question of whether a son shall inherit lies within the volitional determination of the father, it is not unreasonable to require in addition to a highly reliable standard of proof of parenthood, that the alleged father have personal opportunity to participate, if he chooses, in the procedure by which the fact of his fatherhood is established.

Accordingly the decree of Surrogate's Court, Westchester County, should be affirmed.

• • • • •

Decree affirmed, with costs. Opinion by Jones, J. All concur.

Decided November 25, 1975

APPENDIX C.

Decree of Surrogate's Court Westchester County

At the Surrogate's Court, held in and for the County of Westchester, at the County Courthouse, White Plains, New York, on the 26th day of November 1974.

Present:

HON. EVANS V. BREWSTER,

Surrogate.

Index #1760/73

In the Matter of the Petition of ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the estate of Mario Lalli, deceased, to render and settle her accounts as such Administratrix.

ROBERT M. LALLI, residing at 135 Daisy Farm Drive, in the City of New Rochelle, County of Westchester, State of New York, having petitioned the Surrogate's Court of the County of Westchester to compel Rosamond Lalli, Administratrix of the goods, chattels and credits of Mario Lalli, deceased, who at the time of his death resided at 415 Gramatan Avenue, in the City of Mount Vernon, County of Westchester, to render and settle her account as such Administratrix, by a petition duly verified August 23, 1974, and a citation having duly issued thereon returnable on the 20th day of September, 1974, and said Rosamond Lalli having answered said petition by an answer duly verified September 16th, 1974, and having thereafter moved by a

notice of motion dated October 1, 1974, supported by the affidavit of Rosamond Lalli sworn to October 1, 1974, to dismiss the petition of said Robert Lalli on the ground that neither Robert Lalli nor his sister, Maureen Lalli, are distributees of decedent's estate under provisions of EPTL 4-1.2 and the petitioner having submitted an affidavit sworn to October 10, 1974, together with exhibits thereto attached, and affidavit of Rosetta Vollmer Ammirata sworn to October 10, 1974, in opposition thereto, and said Rosamond Lalli having submitted a reply affidavit sworn to October 23, 1974, and said application having come up to be heard on the 25th day of October, 1974, and after hearing Muriel Lawrence, Esq., attorney for the respondent, in support of the application, and Henkin, Henkin and Quinn, Esqs. (Leonard M. Henkin, Esq. of counsel), attorneys for the petitioner, in opposition thereto, and upon reading all of the aforesaid and due deliberation having been had, and the Surrogate having rendered a decision dated November 15, 1974, sustaining the constitutionality of EPTL 4-1.2 in its application to the petitioner and his sister herein, as against their claim that said section is unconstitutional, in application to them

Now, it is

ORDERED, ADJUDGED AND DECREED, that EPTL 4-1.2 is constitutional as applicable to the petitioner herein, and that by reason thereof petitioner is not a distributee of the decedent herein and that he lacks status to petition for compulsory accounting by the Administratrix, and it is further

ORDERED, ADJUDGED AND DECREED, that the petition herein be and the same is hereby dismissed.

EVANS V. BREWSTER
Surrogate

APPENDIX D.

Order of Affirmance of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of October in the year of our Lord one thousand nine hundred and seventy-five, before the Judges of said Court.

WITNESS,

THE HON. CHARLES D. BREITEL,
Chief Judge, Presiding.

JOSEPH W. BELLACOSA, *Clerk*

REMITTITUR November 25, 1975.

SURROGATE'S COURT

No. .....

In the Matter of the Accounting of ROSAMOND LALLI as the Administratrix of the Estate of Mario Lalli, deceased.

(ROBERT M. LALLI, *Appellant;* ROSAMOND LALLI, as Administratrix &c., *Respondent.*)

BE IT REMEMBERED, That on the 13th day of January in the year of our Lord one thousand nine hundred and seventy-five Robert M. Lalli, the appellant in this cause,

came here unto the Court of Appeals, by Henkin, Henkin & Quinn, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the decree of the Surrogate Court, Westchester County. And Rosamond Lalli, the respondent in said cause, afterwards appeared in said Court of Appeals by Muriel Lawrence, her attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Leonard M. Henkin of counsel for the appellant, and by Mr. Leonard A. Weiss of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the decree of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

Opinion by Jones, J.

All concur.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogate Court, Westchester County there to be proceeded upon according to law.

THEREFORE, it is considered that the said decree is affirmed &c., AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogate Court, Westchester County before the Surrogate thereof, according to the form of the statute in such case made and provided, to be en-

forced according to law, and which record now remains in the said Surrogate Court before the Surrogate thereof, &c.

JOSEPH W. BELLACOSA
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, November 25, 1975.

[Seal]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

JOSEPH W. BELLACOSA, *Clerk.*